

California Regional Water Quality Control Board
Santa Ana Region

July 1, 2003

ITEM: 20

SUBJECT: Order No. R8-2003-0080 Confirming the Board's Action on
Administrative Civil Liability Complaint No. R8-2003-0027, Whisper
Ranch Limited, Yucaipa, San Bernardino County

Discussion

On February 19, 2003, the Executive Officer issued Administrative Civil Liability Complaint (ACL) No. R8-2003-0027 (copy attached) to Whisper Ranch Limited (Whisper Ranch) for alleged violations of the State's General Permit for Storm Water Runoff Associated with Construction Activity (General Permit). In the ACL, the Executive Officer proposed an assessment of \$85,000 for the alleged violations. At the April 4, 2003 Board meeting, the Board conducted a public hearing regarding the ACL, received testimony from all interested parties, and affirmed the assessment of \$85,000 as proposed in the ACL. On April 9, 2003, the Executive Officer confirmed this action of the Board in a letter to Whisper Ranch.

On April 25, 2003, Whisper Ranch submitted a petition for review of the action taken by the Regional Board to the State Water Resources Control Board. The petition alleges that the Board's action affirming the ACL was not supported by factual findings. The proposed order includes the factual basis for Board's action at the April 4, 2003 meeting.

The details regarding the ACL are contained in the attached staff report for that item.

RECOMMENDATION

Staff recommends that the Board adopt Order No. R8-2003-0080 as presented.

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

In the matter of:

**Whisper Ranch Ltd.
P.O. Box 978
Calimesa, CA 92320**

Attn: Wayne Simmons

) Tentative Order No. R8-2003-0080
)
) for
) Administrative Civil Liability
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The California Regional Water Quality Control Board, Santa Ana Region (hereinafter Board) held a hearing on April 4, 2003 to receive testimony and take evidence on the allegations contained in Complaint No. R8-2003-0027, dated February 19, 2003, and on the recommendation for the imposition of an assessment of civil liability pursuant to Water Code Section 13385 in the amount of \$85,000. The Board finds as follows:

1. Runoff from the Whisper Ranch Ltd. (Whisper Ranch) construction site (Tract 13521) in the City of Yucaipa is regulated under the State's General Permit for Storm Water Discharges Associated with Construction Activities (General Permit), WDID No. 8 36S317492.
2. On November 26, 2002, Board staff conducted an inspection of the construction site located at northwest corner of Mesa Grande Drive and Wildwood Canyon Road, Yucaipa. The storm water pollution prevention plan (SWPPP) and associated best management practices (BMPs) implemented at the site were not adequate to control the discharge of pollutants from the site. The BMPs specified in the SWPPP were not implemented. The BMPs implemented at the site did not reflect the BMPs in the SWPPP. A significant amount of soil erosion was noted on all the slopes from the previous storm event. Deteriorated and ineffectively placed sandbags were also observed. During the inspection, the construction superintendent was informed that the implemented BMPs were not adequate and he was requested to implement adequate BMPs to stabilize the slopes prior to the next storm event.
3. On December 12, 2002, a Notice of Violation was sent to Whisper Ranch that outlined the aforementioned violations. Whisper Ranch was requested to immediately address the problems identified, to describe the actions taken to address these problems, and to submit a copy of the SWPPP.

4. On December 16, 2002, Board staff re-inspected the site during a storm event and observed sediment-laden discharge into the storm drain system. A significant amount of sediment was observed on all internal streets. The control measures (sandbags, hay bales and temporary detention basins) were inadequate to control sediment discharges from the site.
5. On December 17, 2002, Board staff visited the site to evaluate the condition of the BMPs after the storm event. A significant amount of sediment-laden water was being pumped from the site into the storm drains. There were no BMPs implemented at the site to control and/or minimize the pollutants being discharged.
6. Board staff collected a grab sample of the runoff entering the storm drain and advised Mr. Gary Lammers, the construction manager, to immediately stop pumping muddy water and to implement appropriate BMPs at the site.
7. On December 23, 2002, Regional Board staff received a letter from Whisper Ranch stating that its construction requires the adjustment of BMPs and that it is updating the design and implementation of BMPs to control and minimize pollutant discharges from the site. The letter indicated that an updated copy of the SWPPP would be forwarded to Board staff by January 6, 2003.
8. On December 23, 2002, Board staff re-inspected the site to evaluate improvements in the implementation of BMPs. Staff observed no improvements in the implementation of BMPs. No facility representative was at the site during the site visit.
9. On January 6, 2003, Board staff visited the site and again observed no improvements in the site conditions. However, a corrugated pipe was observed along Wildwood Canyon Road for conveying storm water from the site to the street. Once again, Whisper Ranch was informed of the inadequacy of the control measures at the site.
10. On January 8, 2003, during a storm event, Board staff observed a muddy storm water discharge from the corrugated pipe into a drop inlet structure that drains into Wildwood Canyon Creek. No significant improvements in the implementation of BMPs were observed compared to prior visits. Storm drain inlets were poorly protected and sediment-laden storm water was being discharged to the storm drains.
11. On January 9, 2003, Board staff left a message for the site Project Manager, Mr. Lammers, to call staff to discuss improvements needed for the site. Mr. Lammers did not respond to the message.
12. By these actions, Whisper Ranch violated Provisions A.3 ("Storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance.") and C.2 ("All dischargers shall develop and implement a SWPPP in accordance with Section

A: Storm Water Pollution Prevention Plan. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT performance standard.") of the General Permit for Storm Water Discharges Associated with Construction Activity, Order No. 99-08-DWQ (General Permit). Whisper Ranch failed to develop and implement an effective Storm Water Pollution Prevention Plan (SWPPP) and discharged storm water containing pollutants to waters of the United States from the construction site. Pursuant to Water Code Section 13385 (a)(2), civil liability may be imposed for the preceding violations.

13. Section 13385(a)(2) provides that any person who violates waste discharge requirements shall be civilly liable. Section 13385 (c) provides that civil liability may be administratively imposed by a regional board in an amount not to exceed ten thousand dollars (\$10,000) for each day the violation occurs. Additional liability, not to exceed \$10 per gallon, may be imposed for each gallon discharged in excess of 1,000 gallons.
14. 1.884 million gallons of sediment-laden storm water was discharged to the storm drain system from the site.
15. Pursuant to Section 13385(c), the total maximum assessment for which Whisper Ranch is civilly liable is \$18.86 million based on \$30,000 (\$10,000 per day for 3 days of discharges staff observed) and \$18.83 million based on estimated discharge (1.884 million gallon -1,000 = 1.883 million gallons @\$10 per gallon) for the violations cited in Paragraph 7, above.
16. Whisper Ranch saved approximately \$80,590 by not implementing adequate BMPs at the site (18.5 acres of slopes @ \$.1/sqft). Board staff costs for investigating this incident were approximately \$2,100 (30 hours at \$70/hour). These factors were considered in assessing the penalty proposed in Paragraph 17, below.
17. Section 13385 (e) specifies factors that the Board shall consider in establishing the amount of civil liability. These factors include: nature, circumstances, extent, and gravity of the violation, and, with respect to the discharger, the ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The factors are analyzed in the Staff Report that accompanied ACL Complaint No. R8-2003-0027, which is incorporated herein by reference.
18. The total maximum liability for the violations of the General Permit is \$18.86 million.
19. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 2100 et seq.) in accordance with Section 15321, Chapter 3, Title 14, California Code of Regulations.

July 1, 2003

IT IS HEREBY ORDERED that pursuant to California Water Code Section 13385, civil liability is imposed on Whisper Ranch in the amount of \$85,000 for the violations cited, payable as set forth below.

Whisper Ranch may fulfill its obligation under this Complaint by proceeding according to either (a) or (b) below.

- (a) Whisper Ranch shall notify the Executive Officer in writing by July 15, 2003 that it has elected to participate in a Supplemental Environmental Project. By July 31, 2003, Whisper Ranch shall deposit 50% of the \$85,000 assessment into the SWRCB Cleanup and Abatement Account by cashier's check made out to "State Water Resources Control Board, Cleanup and Abatement Account" and 50% by cashier's check to the Supplemental Environmental Project that it has selected; or
- (b) Whisper Ranch shall pay the entire \$85,000 to the State Water Resources Control Board Cleanup and Abatement Account by July 31, 2003.

Pursuant to Water Code Section 13320, you may petition the State Water Resources Control Board for review of this Order. If you choose to do so, you must submit the petition to the State Board within 30 days of the Regional Board's adoption of this Order.

I, Gerard Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on July 1, 2003.

Gerard J. Thibeault
Executive Officer

California Regional Water Quality Control Board
Santa Ana Region

April 4, 2003

ITEM: 23

SUBJECT: Administrative Civil Liability Complaint No. R8-2003-0027, Whisper Ranch Limited, Yucaipa, San Bernardino County

BACKGROUND

On February 19, 2003, the Executive Officer issued Administrative Civil Liability Complaint (ACL) No. R8-2003-0027 (copy attached) to Whisper Ranch Limited (Whisper Ranch) for alleged violations of the State's General Permit for Storm Water Runoff Associated with Construction Activity (General Permit). In the ACL, the Executive Officer proposed an assessment of \$85,000 for the alleged violations.

INTRODUCTION

The matter before the California Regional Water Quality Control Board, Santa Ana Region (Board), is whether to affirm, reject, or modify the proposed administrative civil liability assessment against Whisper Ranch.

ACL No. R8-2003-0027 was issued by the Executive Officer to Whisper Ranch for failure to develop and implement an effective Storm Water Pollution Prevention Plan (SWPPP), and for discharging storm water containing pollutants to waters of the United States from its construction site.

DISCUSSION

The General Permit regulates the discharge of storm water from construction sites as required under Section 402(p) of the Federal Clean Water Act. Coverage under the permit is obtained by filing a Notice of Intent (NOI), site map, and a fee (annual fee of \$700), with the State Water Resources Control Board. Whisper Ranch filed a NOI and obtained coverage under the General Permit, WDID No. 836S317492. Whisper Ranch's 80-acre construction site is located at the northwest corner of Wildwood Canyon Road and Grande Mesa Drive in the City of Yucaipa.

On November 26, 2002, Board staff conducted an inspection of the construction site. The SWPPP for the site did not specify an effective combination of erosion and sediment control measures, and the best management practices (BMPs) implemented at the site were not adequate to control the discharge of pollutants from the site. Further, the BMPs that were specified in the SWPPP were not fully

implemented, and the BMPs implemented at the site did not reflect the BMPs specified in the SWPPP. Slopes at the site were not properly stabilized. As a result, a significant amount of soil erosion was noted on the slopes, apparently resulting from the previous storm event. During the inspection, Mr. Don Vanhook, construction superintendent, and Mr. Gary Lammers, the project manager, were informed that the implemented BMPs were not adequate, and they were requested to take appropriate measures to stabilize the slopes prior to the next storm event.

On December 12, 2002, a Notice of Violation (NOV) was sent to Whisper Ranch outlining the aforementioned violations. The NOV also required the discharger to implement measures to prevent any further transport of pollutants to the storm drain systems.

On December 16, 2002, Board staff re-inspected the site during a storm event and observed no significant improvements to the pollution control measures. During the inspection, staff observed sediment-laden discharges into the storm drain system. A significant amount of sediment was observed on all internal streets. The control measures (sandbags, hay bales and temporary detention basins) were inadequate to control sediment discharges from the site.

On December 17, 2002, Board staff again visited the site to evaluate the condition of the BMPs after the storm event. A significant amount of sediment-laden water was being pumped and discharged into the storm drains. There were no BMPs implemented at the site to control and/or minimize the pollutants being discharged. Board staff contacted Mr. Gary Lammers, the project manager, and requested him to stop pumping the muddy water into the storm drains. Once again, he was requested to implement appropriate BMPs at the site.

On December 23, 2002, Board staff received a letter from Whisper Ranch stating that due to the dynamic nature of construction activities at the site, constant reevaluation of BMPs was necessary. The letter also indicated that it would update the SWPPP and provide a copy for Board staff's review by January 6, 2003.

On December 23, 2002, Board staff re-inspected the site and observed no improvements in the implementation of BMPs. No facility representative was at the site during this site visit.

On January 6, 2003, Board staff visited the site and again observed no improvements in the pollution control measures. A corrugated pipe was installed along Wildwood Canyon Road to convey storm water to the street with no apparent BMPs. Once again, Whisper Ranch was informed (by phone) of the inadequacy of the control measures at the site.

On January 8, 2003, during a storm event, Board staff observed a muddy storm water discharge from the corrugated pipe onto Wildwood Canyon Road. No

significant improvements in the implementation of BMPs were observed, compared to prior visits. Storm drain inlets were poorly protected, and sediment-laden storm water was being discharged to the storm drains.

On January 9, 2003, Board staff left a message for Mr. Gary Lammers, the site project manager, asking that he call back staff to discuss improvements needed for the site. Mr. Lammers has not responded to the message.

Whisper Ranch is alleged to have violated Provisions A. 3 and C.2 of the General Permit.

Whisper Ranch was repeatedly notified of the need for improvements to its erosion and sediment controls. Its failure to develop and implement an effective SWPPP and its failure to maintain and upgrade BMPs contributed to the discharge of sediments into the storm drain system during most storm events in November 2002, December 2002, January 2003, and February 2003.

After repeated staff requests to improve the site conditions and failure of Whisper Ranch to implement appropriate BMPs, the Executive Officer issued ACL No. R8-2003-0027, on February 19, 2003.

Section 13385(a)(2) provides that any person who violates waste discharge requirements shall be civilly liable. Section 13385(c) provides that civil liability may be administratively imposed by a regional board in an amount not to exceed ten thousand dollars (\$10,000) for each day the violation occurs. Additional liability, not to exceed \$10 per gallon, may be imposed for each gallon discharged in excess of 1,000 gallons.

Whisper Ranch is alleged to have violated Provisions A.3 and C.2 of the General Permit. Whisper Ranch violated C.2 by failing to properly develop and implement an effective SWPPP and violated A.3 by discharging sediment-laden storm water to waters of the United States from the construction site. Pursuant to Water Code Section 13385(a)(2), civil liability may be imposed for the preceding violations. The maximum potential liability for these violations is \$ 18.83 million (see the attached ACL for details).

Water Code Section 13385(e) specifies factors that the Board shall consider in establishing the amount of civil liability. These factors are discussed below.

Nature, Circumstances, Extent and Gravity of Violation

By submitting the NOI, the discharger certified that it would comply with the provisions of the permit, including the development and implementation of a SWPPP and a Monitoring Program.

The SWPPP did not specify appropriate BMPs for erosion and sediment controls. Moreover, the BMPs that were identified in the SWPPP were not implemented or maintained. The failure of Whisper Ranch to upgrade the BMPs at the site, and its failure to provide adequate employee training and oversight of its operations led to inadequate BMP implementation and caused pollutants to be repeatedly discharged into the waters of the U.S. The storm drains in the area are tributary to Wildwood Creek.

Whisper Ranch ignored repeated written and oral requests for corrective measures at the site.

Ability to Pay the Proposed Assessment

The discharger has not provided any information to indicate that it would not have the ability to pay the proposed assessment.

Prior History of Violations

Whisper Ranch has not been responsive to Board staff's efforts to bring the site into compliance. Board staff issued a Notice of Violation on December 12, 2002 for several violations of the General Permit. Despite the Notice of Violation and several oral warnings, Whisper Ranch was not in compliance during subsequent inspections of the site on December 16, 2002, December 17, 2002, December 23, 2002, January 6, 2003, January 8, 2003, February 13, 2003, and February 25, 2003. Whisper Ranch failed to correct the violations.

Degree of Culpability

The discharger violated the Clean Water Act and the California Water Code by discharging storm water containing pollutants and by not complying with the terms and conditions of the General Permit by failing to develop and implement an effective site-specific SWPPP and by failing to properly implement an inspection program to monitor the effectiveness of the BMPs. Despite repeated requests to upgrade erosion control measures at the site, the discharger did not implement adequate erosion control BMPs and continued to discharge polluted storm water into the waters of the U.S.

Economic Benefit or Savings, if any, Resulting from the Violations

By not developing and implementing an effective SWPPP, Whisper Ranch gained an economic advantage over its competitors. Economic savings from these violations are estimated as follows:

Whisper Ranch saved approximately \$80,600 by not implementing adequate BMPs for slope protection (based on 18.5 acres of slopes @ \$.10/sqft).

STATEWIDE ENFORCEMENT POLICY

On February 19, 2002, the State Water Resources Control Board adopted a State Water Quality Enforcement Policy to ensure that enforcement actions throughout the State are fair, firm and consistent. The above-described administrative civil liability complaint is in accordance with the Statewide Enforcement Policy.

RECOMMENDATION

After consideration of the above factors, staff recommends that the Board affirm the assessment of \$85,000, specified in the Administrative Civil Liability Complaint issued by the Executive Officer on February 19, 2003.



California Regional Water Quality Control Board

Santa Ana Region

Winston H. Hickox
Secretary for
Environmental
Protection

Internet Address: <http://www.swrcb.ca.gov/rwqcb8>
3737 Main Street, Suite 500, Riverside, California 92501-3348
Phone (909) 782-4130 - FAX (909) 781-6288



Gray Davis
Governor

June 16, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. E. Wayne Simmons
Whisper Ranch Ltd.
P.O. Box 978
Calimesa, CA 92320

TENTATIVE ORDER NO. R8-2003- 0080, TRACT 13521, YUCAIPA, SAN BERNARDINO COUNTY

Dear Mr. Simmons:

We are enclosing a copy of tentative Order No. R8-2003-0080, which will be considered by the Board at the July 1, 2003 Board meeting. The Staff Report and the agenda announcement for the Board meeting are also enclosed.

At the April 4, 2003 Board meeting, the Board affirmed an assessment of \$85,000, as proposed in Administrative Civil Liability Complaint No. R8-2003-0027 (Complaint), for violations of the State General Permit for Storm Water Discharges Associated with Construction Activities. The tentative order includes findings to support the April 4, 2003 Board action. If adopted by the Board, the tentative order would replace my April 9, 2003 letter to you regarding this matter.

If you have any questions regarding this matter, you may contact Ms. Milasol C. Gaslan at 909-782-4419 or Mr. Michael Adackapara at 909-782-3238. All legal questions should be referred to our legal counsel, Mr. Jorge Leon, at 916-341-5180.

Sincerely,

Gerard J. Thibeault
Executive Officer

Enclosures: Tentative Order No. R8-2003-0080, Staff Report and Agenda
Announcement

Cc with enclosures:

California Environmental Protection Agency

Whisper Ranch Ltd.
Mr. E. Wayne Simmons

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June 16, 2003

Regional Board

Bruce Fujimoto, State Water Resources Control Board, Division of Water Quality

Jorge Leon, State Water Resources Control Board, Office of Chief Counsel

Kathie Moore, US-EPA, Region 9 (WTR-7)

San Bernardino County, Storm Water Program – Naresh Varma, NPDES

Coordinator

City of Yucaipa – Fred Hawkins, NPDES Coordinator

Riley Clark